

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT CHANDLER, AS)	Case No. 11-03831 SC
REPRESENTATIVE OF THE ESTATE OF)	
ROSEMARY S. CHANDLER,)	ORDER GRANTING MOTION TO
individually and on behalf of)	<u>DISMISS</u>
all others similarly situated,)	
)	
Plaintiff,)	
)	
v.)	
)	
WELLS FARGO BANK, N.A., and)	
FEDERAL NATIONAL MORTGAGE)	
ASSOCIATION a/k/a FANNIE MAE,)	
)	
Defendants.)	

I. INTRODUCTION

Plaintiff Robert Chandler ("Plaintiff") brings this putative class action in connection with Defendants Wells Fargo, N.A. ("Wells") and Federal National Mortgage Association's ("Fannie Mae") (collectively, "Defendants") alleged breach of his mother's reverse mortgage, also known as a home equity conversion mortgage ("HECM"). ECF No. 64 (First Amended Complaint ("FAC")). Defendants now move to dismiss. ECF No. 67 ("MTD"). The motion is fully briefed, ECF Nos. 69 ("Opp'n"), 70 ("Reply"), and appropriate

1 for resolution without oral argument per Civil Local Rule 7-1(b).
2 For the reasons set forth below, the Motion is GRANTED.

3
4 **II. BACKGROUND**

5 **A. The Parties and Plaintiff's Allegations**

6 Plaintiff resides at 10095 Sheldon Road, Elk Grove, California
7 (the "Property"). In 2006, Plaintiff's mother, Rosemary S.
8 Chandler, took out a \$544,185 reverse mortgage loan that was
9 secured by the Property. Ms. Chandler signed the Home Equity
10 Conversion Deed of Trust (the "HECM Deed") as trustee for Rosemary
11 S. Chandler, 1993 Trust. ECF No. 68 ("RJN") Ex. A ("HECM Deed").
12 Wells originated the reverse mortgage but later sold it to Fannie
13 Mae. Wells continued to service the loan.

14 Ms. Chandler died in January 2010. FAC ¶ 46. At the time of
15 her death, the HECM balance was approximately \$338,000 and the
16 value of the home was approximately \$252,698. Id. Plaintiff
17 contacted Wells about purchasing the home for its appraised value,
18 but Wells insisted that Plaintiff would have to pay off the full
19 loan balance. Id. ¶ 47. Plaintiff subsequently received a notice
20 from a substitute trustee that the mortgage was in default due to
21 failure to pay the entire principal balance. Id. ¶ 48. Plaintiff
22 alleges that, pursuant to the HECM Deed and HUD regulations,
23 Defendants should have provided him with notice and an opportunity
24 to purchase the Property at 95 percent of its appraised value.

25 **B. The HECM at Issue**

26 Unlike a typical mortgage, where a borrower receives loan
27 proceeds as a lump sum, uses the proceeds to buy a home, and then
28 pays back the loan gradually, a "reverse" mortgage borrower already

owns a home and takes out a loan against its equity. In the reverse of a typical mortgage, an HECM borrower generally receives the loan proceeds in gradual payments and pays back the loan in a lump sum.

Repayment is triggered by certain qualifying events. Those qualifying events are set forth in Paragraph 9 of the HECM Deed. Specifically, Paragraph 9(a) provides that the lender may require immediate repayment in full of all sums secured if (i) the borrower dies, or (ii) all of the borrower's title in the Property is sold or otherwise transferred. Paragraph 9(b) sets forth other conditions under which the loan may become due and payable that are not relevant here. Paragraph 9(d) provides that the lender shall notify the Secretary of Housing and Urban Development ("HUD") and the borrower "whenever the loan becomes due and payable under paragraph 9(a)(ii)," that is, whenever the loan becomes due and payable because the borrower transfers her interest in the property, or under paragraph 9(b). Paragraph 9(d) omits any reference to the death of the borrower as a triggering event for notice.

Paragraph 9(d) further provides that lender shall not have the right to commence foreclosure until the borrower has had thirty days after the notice to either:

(i) Correct the matter which resulted in the Security Instrument coming due and payable; or

(ii) Pay the balance in full; or

(iii) Sell the Property for the lesser of the balance or 95% of the appraised value and apply the net proceeds of the sale toward the balance; or

(iv) Provide the Lender with a deed in lieu of foreclosure.

Subparagraph (iii) sets forth the so-called "95 percent rule" that Plaintiff now seeks to enforce.

The terms of the HECM Deed also protect Ms. Chandler and her heirs from deficiency judgments. Specifically, paragraph 10 of the HECM Deed provides that lender may only enforce the debt through sale of the property and that the lender shall not be permitted to obtain a deficiency judgment against the borrower.

B. HUD Regulations and Guidelines

Plaintiff alleges that Ms. Chandler's reverse mortgage was insured by HUD. HUD regulations parallel the provisions of the HECM Deed in many respects. For example, 24 C.F.R. § 206.27(c)(1)(i) and (ii) mirror the provisions of paragraph 9(a) and 9(b) of the HECM Deed, stating that the reverse mortgage becomes due and payable when, among other things, the borrower dies or the borrower conveys title to the property to another.

Like paragraph 9(d) of the HECM Deed, HUD regulations provide that the lender shall notify the borrower that the mortgage is due and payable, "unless the mortgage is due and payable by reason of the mortgagor's death." Id. § 206.125(a)(2). The regulations continue:

The mortgagee shall require the mortgagor to (i) pay the mortgage balance, including any accrued interest and MIP, in full; (ii) sell the property for at least 95% of the appraised value as determined under § 206.125(b), with the net proceeds of the sale to be applied towards the mortgage balance; or (iii) provide the mortgagee with a deed in lieu of foreclosure. The mortgagor shall have 30 days in which to comply with the preceding sentence, or correct the matter which

1 resulted in the mortgage coming due and payable,
2 before a foreclosure proceeding is begun.

3 Id.

4 HUD regulations also allow the borrower to sell the property
5 at any time and limit liability to no more than the appraised value
6 of the property:

7
8 Whether or not the mortgage is due and payable, the
9 mortgagor may sell the property for at least the
10 lesser of the mortgage balance or the appraised value
11 (determined under § 206.125(b)). If the mortgage is
12 due and payable at the time the contract for sale is
13 executed, the mortgagor may sell the property for at
14 least the lesser of the mortgage balance or five
15 percent under the appraised value.

16 Id. § 206.125(c).

17 In December 2008, HUD issued guidance regarding these
18 regulations. RJN Ex. E. That guidance states that a borrower or
19 the borrower's estate cannot "pay off the loan balance of a HECM
20 for the lesser of the mortgage balance or the appraised value of
21 the property while retaining ownership of the home." Id. The
22 guidance further states that if the HECM is due and payable and the
23 borrower or the borrower's estate wants to retain ownership of the
24 subject property, the HECM must be repaid in full. HUD explained
25 that HECMs were non-recourse loans and "[n]on-recourse means simply
26 that if the borrower (or estate) does not pay the balance when due,
27 the mortgagee's remedy is limited to foreclosure and the borrower
28 will not be personally liable for any deficiency resulting from the
29 foreclosure." Id.

30 HUD rescinded this guidance in April 2011. RJN Ex. G. A few
31 months later, in July 2011, HUD issued new guidance explaining that

1 when an HECM loan becomes due and payable as a result of the
2 borrower's death, the borrower's heirs may satisfy the HECM debt by
3 paying the lesser of the mortgage balance or 95 percent of the
4 current appraised value of the property. FAC Ex. A. at 1. The new
5 guidance further provides that lender should grant heirs 90 to 180
6 days to make the required payments.

7 **C. Procedural History**

8 Based on the allegations set forth above, the HECM Deed, and
9 the HUD regulations, Plaintiff asserts claims for (1) declaratory
10 relief, (2) breach of contract, and (3) violation of the California
11 Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, et
12 seq.

13 With respect to the first cause of action, Plaintiff seeks a
14 declaration that (a) Defendants are required to provide notice to
15 borrowers that they can sell or transfer their properties for 95
16 percent of the appraised value before Defendants may initiate
17 foreclosure proceedings, (b) Defendants cannot initiate foreclosure
18 proceedings if a borrower endeavors to sell or transfer the
19 property for 95 percent of the appraised value, (c) Defendant's
20 failure to provide notice and an opportunity to sell violates 12
21 U.S.C. § 1715z-20, as well as HUD regulations, (d) any foreclosure
22 that occurs prior to the required notice or after a denial of an
23 opportunity to sell is illegal and a breach of contract.

24 Plaintiff's other claims for breach of contract and UCL
25 violations are likewise premised on Defendants' alleged obligation
26 to provide Plaintiff with notice and opportunity to take advantage
27 of the 95 percent rule.

28 ///

1 This is a putative class action brought under Federal Rule of
2 Civil Procedure 23(b)(2). The proposed class is defined as
3 "estates and personal representatives of HECM borrowers, whose
4 loans are or were owned and/or serviced by Defendants, and who are
5 entitled to notice and the opportunity to purchase properties for
6 95% of appraised value." FAC ¶ 54.

7 8 **III. LEGAL STANDARD**

9 A motion to dismiss under Federal Rule of Civil Procedure
10 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
11 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
12 on the lack of a cognizable legal theory or the absence of
13 sufficient facts alleged under a cognizable legal theory."
14 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
15 1988). "When there are well-pleaded factual allegations, a court
16 should assume their veracity and then determine whether they
17 plausibly give rise to an entitlement to relief." Ashcroft v.
18 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court
19 must accept as true all of the allegations contained in a complaint
20 is inapplicable to legal conclusions. Threadbare recitals of the
21 elements of a cause of action, supported by mere conclusory
22 statements, do not suffice." Id. (citing Bell Atl. Corp. v.
23 Twombly, 550 U.S. 544, 555 (2007)).

24 25 **IV. DISCUSSION**

26 Defendants now move to dismiss Plaintiff's claims on the
27 ground that the HECM Deed does not give Plaintiff the right to
28 notice or opportunity to purchase the Property at 95 percent of the

1 appraised value. Defendants further argue that the Plaintiff
2 cannot premise his claims on HUD regulations or guidance because
3 they do not provide for a private right of action. Finally,
4 Defendants argue that even if Plaintiff could sue under HUD
5 regulations, those regulations do not support his claim that he a
6 right to notice and opportunity to purchase the Property at 95
7 percent of its appraised value.

8 **A. The HECM Deed**

9 The Court agrees with Defendants that the HECM Deed, read
10 alone, does not provide Plaintiff with a right to notice and an
11 opportunity to purchase the Property at 95 percent of its appraised
12 value. Both parties appear to agree that the HECM became due and
13 payable upon the death of borrower, Ms. Chandler. The plain
14 language of the HECM Deed provides that where the borrower dies,
15 "the Lender may require immediate payment in full of all sums
16 secured by the [Deed]," which is essentially what Defendants
17 demanded after the death of Ms. Chandler. HECM Deed ¶ 9(a).

18 Plaintiff urges the Court to look to paragraph 9(d) of the
19 HECM Deed, which provides that that the lender shall notify the
20 borrower whenever the loan becomes due and payable pursuant to
21 Paragraphs 9(a)(ii) and 9(b), neither of which pertains to the
22 death of the borrower. Paragraph 9(d) further provides that the
23 lender shall not commence foreclosure proceedings until the
24 borrower has had thirty days after notice to, among other things,
25 sell the property for the lesser of the outstanding HECM balance or
26 95 percent of the Property's appraised value.

27 There are a few problems with Plaintiff's contention that
28 paragraph 9(d) entitles him to notice and an opportunity to take

1 advantage of the 95 percent rule. First and foremost, paragraph
2 9(d) specifically omits any reference to paragraph 9(a)(i), which
3 pertains to the death of a borrower, as a triggering event for
4 notice. Second, paragraph 9(d) refers to the rights of the
5 borrower, not the borrower's heirs. Third, because paragraph 9(d)
6 provides that notice is only required where the HECM becomes due
7 and payable pursuant to paragraphs 9(a)(ii) and 9(b), neither of
8 which pertain to the death of the borrower, and because paragraph
9 9(d) only allows for options such as the purchase of the property
10 for 95 percent of the appraised value "after notice," it follows
11 that the HECM Deed does not expressly provide the borrower's heirs
12 with the right to take advantage of the 95 percent rule after the
13 death of the borrower.

14 Plaintiff contends that "while the options might more artfully
15 have been placed in a separate section of the mortgage," his right
16 to notice and opportunity to purchase the property for 95 percent
17 of its appraised value prior to foreclosure is "indisputable."
18 Opp'n at 5. Plaintiff reasons that any other reading would
19 eviscerate paragraph 10 of the HECM Deed. Id. The Court
20 disagrees. Paragraph 10 merely provides that the lender shall not
21 be permitted to obtain a deficiency judgment against the borrower
22 if HECM deed is foreclosed. Nothing in this provision is
23 inconsistent with refusing to allow a borrower's heirs to purchase
24 a borrower's property for 95 percent of its appraised value.

25 Plaintiff also argues that Defendants' interpretation of
26 their notice obligations is somehow inconsistent with paragraph 20
27 of the HECM Deed, which pertains to foreclosure procedures. Id. at
28 8-9. This argument also lacks merit. Paragraph 20 merely requires

1 that, in the event the lender requires satisfaction of the
2 outstanding HECM balance, the lender must provide a notice of
3 default and other notice required by applicable law. There is no
4 dispute that Defendants provided such notice in this case. In any
5 event, Paragraph 20 does not require notice of the 95 percent rule
6 that Plaintiff now demands.

7 Next, Plaintiff contends that paragraph 9(a)(ii) of the HECM
8 Deed independently requires notice. Id. at 11. That provision
9 states that the lender may require immediate payment of the
10 outstanding HECM balance where all of a borrower's title in the
11 Property is sold or otherwise transferred. Paragraph 9(d) requires
12 that the lender provide notice of the 95 percent rule whenever the
13 loan becomes due and payable under paragraph 9(a)(ii). Plaintiff
14 reasons that "HUD has made clear that it 'interprets the word sale
15 to include any post-death conveyance of the mortgage property (even
16 by operation of law) to the borrower's estate or heirs.'"¹ Opp'n
17 at 11. The Court remains unconvinced. Paragraph 9(a) refers to
18 two types of events that could cause the HECM to become due and
19 payable: (i) the death of the borrower, (ii) the sale or transfer
20 of the Property. Plaintiff's interpretation renders subsection
21 (ii) nugatory, strains common sense, and would essentially require
22 the Court to read the contract in a manner inconsistent with its
23 plain meaning.

24 Accordingly, the Court finds that the plain language of the
25 HECM Deed does not support Plaintiff's position that he was
26 entitled to notice and an opportunity to purchase the Property for

27
28 ¹ Plaintiff does not identify the HUD guidance from which he
quotes.

1 95 percent of its appraised value.

2 **B. HUD Regulations and Guidance**

3 Plaintiff contends that the HUD regulations require notice and
4 opportunity to purchase the Property for 95 percent of its
5 appraised value, and that the HECM Deed manifests the parties'
6 intent to be bound by those regulations. Opp'n at 13. However,
7 Plaintiff cannot point to a particular provision of the HECM Deed
8 incorporating HUD regulations.

9 Plaintiff cites Norfolk and Western Railway Company v.
10 American Train Dispatchers' Association, 499 U.S. 117, 130 (1991),
11 for the general proposition that "[l]aws which subsist at the time
12 and place of the making of a contract, and where it is to be
13 performed, enter into and form a part of it, as fully as if they
14 had been expressly referred to or incorporated in its terms."
15 Opp'n at 14 n.46. However, this broad canon of construction does
16 not trump the standard inquiry used to determine whether a federal
17 statute creates an implied cause of action. Umland v. PLANCO Fin.
18 Servs., Inc., 542 F.3d 59, 66 (3d Cir. 2008). Moreover, courts
19 have been reluctant to incorporate statutory or HUD regulatory
20 provisions into a contract unless the contract explicitly provides
21 for their incorporation. See St. Christopher Assocs., L.P. v.
22 United States, 511 F.3d 1376, 1384 (Fed. Cir. 2008).

23 Even if Plaintiff could rely on the HUD regulations, they do
24 not support his position that he was entitled to notice and
25 opportunity to purchase the property for 95 percent of its
26 appraised value. With respect to notice, the regulations provide
27 that a borrower is entitled to notice "unless the mortgage is due
28 and payable by reason of the mortgagor's death by reason of the

1 borrower's death." 24 C.F.R. § 206.125(a)(2). Thus, Plaintiff
2 cannot credibly contend that the regulations entitled him to notice
3 when the HECM became due and payable by virtue of the death of his
4 mother.

5 The regulatory provisions pertaining to the right to purchase
6 a subject property for 95 percent of its appraised value presents a
7 closer question. Section 206.125(a)(2) is substantially similar to
8 paragraph 9(d) of the HECM Deed, which as discussed above,
9 indicates that the 95 percent rule does not apply upon the death of
10 the borrower. However, 24 C.F.R. § 206.125(c), which is unlike any
11 provision in the HECM Deed, provides that if the mortgage is due
12 and payable for any reason, the "mortgagor" may sell the property
13 for 95 percent of its appraised value. Section 206.123 suggests
14 that, in certain contexts, the term "mortgagor" encompasses the
15 mortgagor's estate or personal representative. Read together,
16 sections 206.123 and 206.125(c) suggest that a borrower's estate
17 may have the right to sell a subject property for 95 percent of its
18 appraised value. However, the regulations are far from clear on
19 this point.²

20 Even if sections 206.123 and 206.125(c) can be read to allow
21 an heir or estate to take advantage of the 95 percent rule, HUD
22 adopted a contrary view at the time of Ms. Chandler's death in
23

24 ² Section 206.123(a) provides that mortgagees may submit claims for
25 payment of the mortgage insurance benefits if, among other things,
26 "[t]he mortgagor sells the property for less than the mortgage
27 balance and the mortgagee releases the mortgage of record to
28 facilitate the sale, as provided in § 206.125(c)." Section
206.123(b) provides that "[t]he term mortgagor as used in this
subpart . . . shall also mean the mortgagor's estate or personal
representative." It is unclear whether this means that the
expanded definition of mortgagor also applies to the 95 percent
rule as set forth in § 206.125(c).

2010. In guidance issued in December 2008, HUD stated "[i]f the mortgage is due and payable and the borrower (or estate) desires to retain ownership of the property, the mortgage debt must be repaid in full." RJN Ex. E at 2. HUD later retracted the December 2008 guidance, but not until after Plaintiff sought to purchase the Property. Accordingly, at the time Defendants rejected Plaintiff's offer to purchase the property, they were acting in accordance with express directives from HUD. An agency's interpretation of its regulations is entitled to deference. Pub. Lands for the People, Inc., v. U.S. Dept. of Agric., 697 F.3d 1192, 1199 (9th Cir. 2012).

In sum, the Court finds that the HUD regulations were not incorporated into the HECM Deed and, even if they were, those regulations do not support Plaintiffs' claims.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' motion to dismiss and DISMISSES Plaintiff Robert Chandler's First Amended Complaint. Since the Court finds that amendment would be futile, dismissal is WITH PREJUDICE.

IT IS SO ORDERED.

Dated: January 3, 2014



UNITED STATES DISTRICT JUDGE